



May 8, 2023

Via email: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

Vanessa Countryman  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**RE: Comment Letter for Release No. IA-6240; File No. S7-04-23**

Dear Ms. Countryman,

Bakkt Holdings, Inc. ("Bakkt") appreciates the opportunity to provide the U.S. Securities and Exchange Commission ("Commission") with our perspective on the proposed amendment and redesignation of Rule 206(4)-2) under the Investment Advisers Act of 1940<sup>1</sup> relating to investment advisers' practices for safeguarding client assets (the "Proposed Rule").<sup>2</sup>

Since its inception in 2018, Bakkt has prioritized transparency, compliance, and consumer protection. Originally created as a subsidiary of Intercontinental Exchange, Inc. ("ICE"), Bakkt leveraged ICE's industry-leading, world-class competency to build a dedicated bitcoin custodian, Bakkt Trust Company LLC ("Bakkt Trust"), authorized as a limited-purpose trust company by the New York State Department of Financial Services ("NYDFS"). Bakkt Trust originally provided custody to support the first physically-delivered bitcoin futures contracts traded and cleared on ICE, as well as stand-alone custody services to institutional investors.

Subsequently, we formed Bakkt Marketplace, LLC ("Bakkt Marketplace") to operate Bakkt's consumer-facing crypto services, first through a branded consumer app and currently, as a crypto platform embedded into partner ecosystems. In keeping with our compliance-first philosophy, Bakkt Marketplace holds a BitLicense from NYDFS, as well as state money transmitter licenses throughout the U.S. where required. All crypto made available to consumers on the Bakkt Marketplace platform is custodied by Bakkt Trust.

In late 2021, Bakkt completed a merger with VPC Impact Acquisition Holdings to become a publicly-traded company listed on the New York Stock Exchange. We believe that the regulation, reporting and oversight required of a public company is further evidence of our commitment to security and compliance. In April 2023, Bakkt completed its acquisition of Apex Crypto LLC ("Apex Crypto"), itself a BitLicense-holding crypto operation which provides embedded crypto services to customers of broker-dealers, registered investment advisors, and fintechs.

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<sup>1</sup> 17 CFR § 275.206(4)-2.

<sup>2</sup> Securities and Exchange Commission, *Safeguarding Advisory Client Assets* (Feb. 15, 2023), available at <https://www.sec.gov/rules/proposed/2023/ia-6240.pdf>.



While the Commission has proposed a number of changes to the current custody rule through the Proposed Rule, we have limited our commentary to the following items, focused on certain implications for digital asset markets and custody practices:

- the assets subject to the Proposed Rule;
- which entities can be qualified custodians; and
- certain obligations of those qualified custodians.

1. Assets Subject to the Proposed Rule.

Bakkt supports the requirement that advisers maintain assets held in a client's account with a qualified custodian. We agree with the Commission that custody and safeguarding protections "should not depend on which type of assets the client entrusts to the adviser."<sup>3</sup> In this regard, we support the inclusion of crypto assets within the scope of the Proposed Rule. However, in order to ensure that advisers and other market participants can comply with the Proposed Rule as it applies to crypto assets, we respectfully request that the Commission provide additional guidance with respect to qualified custodians and the application of the Proposed Rule's qualified custodian requirements in this context, as further described in this letter.

2. Entities Eligible to Be Qualified Custodians Under the Proposed Rule.

The Proposed Rule acknowledges the regulatory framework for custodians "is evolving...to accommodate new entrants to the market for custodial services, including newly launched state-chartered trust companies that focus on providing crypto asset custody services" and that "[i]n light of this evolution, [the Commission] must be mindful of the extent to which many of these new entrants to the custodial marketplace offer, and are regulated to provide, the types of protections [the Commission] believe[s] a qualified custodian should provide under the [Proposed] [R]ule."<sup>4</sup> We strongly believe that state-chartered trust companies are adequately regulated and meet the definition of a qualified custodian as a "bank" and should, assuming that any such company complies with all other relevant requirements under the Proposed Rule, be eligible to serve as a qualified custodian.

Having promulgated the BitLicense framework in 2015, NYDFS has perhaps more experience regulating crypto companies than any other state regulator, and at least as much experience as the relevant federal markets regulators. NYDFS's deep expertise and understanding of the crypto asset space and robust regulatory standards led Bakkt to seek authorization from NYDFS for Bakkt Trust to operate as a limited-purpose trust company. On the basis of ICE's decades of experience in financial markets, we believe that secure, compliant custody solutions are the bedrock on which financial products and services rest, and we believe that complying with NYDFS regulation signifies our strong commitment to that service. We do not have direct experience with other states' crypto custody rules and as such, we do not offer comment as to the adequacy of those regimes. However, we certainly believe that the regulatory framework imposed by NYDFS on limited-purpose trust companies like Bakkt Trust is more than sufficient to address the concerns of the Proposed Rule with respect to the types of entities that may be qualified custodians.

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<sup>3</sup> *Id.* at 27.

<sup>4</sup> *Id.* at 75-76.



Moreover, we have practical concerns regarding the consequences of excluding state-chartered banks and trust companies from being able to serve as qualified custodians given the very small number of federally-regulated banks currently willing and able to serve as crypto asset custodians, which creates significant concentration of risk. Absent a path for state-chartered banks or trust companies to be qualified custodians for crypto assets, we fear that consumers and investors will be less protected and will have limited choices for custody services to protect their assets. Nor do we think that the availability of deposit insurance or deposit-taking functions should factor into whether a person can act as a qualified custodian, given that crypto assets do not benefit from deposit insurance and the statutory “bank” definition includes state-regulated non-depository institutions. Allowing state-chartered trust companies to serve as qualified custodians for crypto assets would thus facilitate advisers’ ability to safeguard customer assets in compliance with the Proposed Rule.

3. Other Obligations of Qualified Custodians.

We appreciate the Commission’s focus on requiring a qualified custodian to demonstrate “possession and control” of crypto assets.

The Bakkt platform historically has made available to consumers only crypto assets for which Bakkt itself provides custody through Bakkt Trust.<sup>5</sup> As Chair Gensler has noted, we believe there is significant value to investors in separating custody and exchange functionality, as we have done with Bakkt Trust and Bakkt Marketplace.<sup>6</sup>

Bakkt Trust’s possession and control practices for crypto assets are robust, which consist of comprehensive physical and logical security, strict segregation of duties, and strong KYC/AML policies. All Bakkt Trust wallets require multiple approvals to sign transactions and we are not dependent on any third party to sign blockchain transactions. Keys are geographically separated, and access is logically segregated by team. Cold wallet keys are stored in secured vaults with extensive cyber and physical protections, including 24x7 surveillance, biometric screening, and multi-layer security protocols. We believe Bakkt’s approach satisfies the “possession and control” requirement as described in the Proposed Rule.

We otherwise generally see no issue with respect to the other obligations discussed in the Proposed Rule, including requirement for investment advisers and qualified custodians to maintain certain written agreements, and obligations with respect to sending statements, segregating assets from corporate assets and not subjecting customer assets to liens.

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<sup>5</sup> We note that Apex Crypto currently offers crypto assets through a different custody model; however, as part of the integration of the Apex Crypto business, we plan to transition the majority of those crypto assets to Bakkt’s custody operations.

<sup>6</sup> See *Testimony of Chair Gary Gensler before the United States House of Representatives Committee on Financial Services* (Apr. 18, 2023) available at <https://www.sec.gov/news/testimony/gensler-testimony-house-financial-services-041823>.



We greatly appreciate the opportunity to share our comments on the Proposed Rule, and we look forward to continued opportunities to engage in dialogue with the Commission with respect to the Proposed Rule and the evolving regulation of crypto assets more generally.

Very truly yours,

DocuSigned by:  
*Marc D'Annunzio*  
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Marc D'Annunzio  
General Counsel and Secretary  
Bakkt Holdings, Inc.